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No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ of Certiorari to
The U.S. Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* WISCONSIN BUILDERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), relieve state and local officials of the deterrent impact of compliance with the Civil Rights Act, 42 U.S.C. §1983?

2. Does the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), deprive federal takings claimants of the choice of courts afforded to them by 42 U.S.C. §1983?

3. Is Just Compensation denied at the time of a regulatory taking of private property, or is it denied only after a state court has ruled compensation is not owed?

4. Does the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), deprive federal takings claimants of the remedy afforded by 42 U.S.C. §1988?

5. Is the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), contrary to the provisions of Rule 18(b) of the Federal Rules of Civil Procedure?

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STATEMENT OF INTEREST

Amicus Curiae, Wisconsin Builders Association, hereinafter WBA, is a Wisconsin non-profit trade association comprised of more than 6,500 separate businesses across the State of Wisconsin engaged in residential and light commercial construction, remodeling and related industries.[1] Collectively, WBA's members employ more than 250,000 persons in the State of Wisconsin. One of WBA's principal policy goals is the promotion of legal and public policies that lead to greater availability, quality, and affordability of housing and commercial property for the people and businesses of Wisconsin.

Increasingly today, the media and local officials are heard loudly asserting that housing affordability is becoming a housing affordability crisis. As the cost of providing housing continues to rise, WBA has concluded that the rise in housing costs is disproportionately attributable to government regulation of the land upon which its members must build, a conclusion born out by the results of a recent Harvard University study.[2] Over the

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[1] Counsel for all parties have filed standing consents with the Clerk of the Court to the filing of *amicus* briefs by any party. Sup. Ct. R. 37.3. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amicus* or its counsel, made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6..

[2] E. Glaeser and J. Gyourko, *The Impact of Zoning on Housing Affordability,* (Harvard Institute of Economic Research, Discussion Paper No. 1948, 2002), prepared for the conference on "Policies to Promote Affordable Housing," sponsored by the Federal Reserve Bank of New York and the New York University School of law. The authors' introduction states: "Does America face an affordable housing crisis and, if so, why? This paper argues that in much of America the price of housing is quite close to the marginal, physical costs of new construction. The price of housing is significantly higher than

years, as the portion of the cost of housing attributable to land continues to rise, WBA has come to recognize that it must play a role in the land use regulatory process. If WBA hopes to preserve the affordability of the product its members provide, it must address the factors increasing the cost of land.

Many years ago, WBA undertook to be involved in the legislative process, so that, as legislation affecting land came under consideration, its voice would be heard. Increasingly, however, WBA has observed that the courts, by permitting or limiting the ways state and local officials administer land use, play a substantial role in shaping the regulatory environment within which housing must be produced and marketed.

WBA recognizes the strong societal interest in and need for land use regulation. At the same time, however, it recognizes, as has this Court, that there can be instances where those regulating the land may go too far. When this happens, the cost of land unnecessarily rises. WBA seeks to prevent or limit the occasions in which government "goes too far."

Once government has "gone too far," WBA believes it is essential that the courts properly and effectively address the issue and redress those responsible. WBA believes that those who would violate the civil rights of a property owner must understand that they are subject to the provisions of 42 U.S.C. §1983, when they act "under color of state law."

All too often, the victims of such actions are small land owners, lacking the financial ability to insist that government respect their rights. In Wisconsin, large

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construction costs only in a limited number of areas, such as California and some eastern cities. In those areas, we argue that high prices have little to do with conventional models with a free market for land. Instead, our evidence suggests that zoning and other land use controls play the dominant role in making housing expensive."

homebuilders are the exception, and not the rule. WBA has approximately 2,000 builder members, but more than 75 percent of them build ten or fewer houses a year.

For this vast majority of Wisconsin builders, an investment in land rendered unusable by improper land use regulation can have catastrophic consequences for its owner, often ending in bankruptcy or foreclosure. It is neither irrelevant nor lost upon those contemplating a challenge to an improper regulation that *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), was prosecuted, not by the land owner, but by the bank that foreclosed upon the owner.

Amicus would assert that local officials, too, know that, by improperly refusing a permit, they can bankrupt a claimant, or, at a minimum, cause the claimant sufficient financial difficulty that the claimant will have no choice but to abandon a valid claim, rather than pursue a legal remedy at prohibitive expense.

WBA believes it is imperative that when the civil rights of a property owner are violated by state or local officials, the remedies afforded by 42 U.S.C. §1988, The Civil Rights Attorney's Fees Awards Act of 1976, must be available to the victim. Today, under *Williamson*, they are not.

Thus, a possible claimant, confronted by the *Williamson* requirement that available state claims be pursued first, undertakes state court litigation knowing the cost of such a suit is his to bear, alone. At the same time, a local official, contemplating the imposition of inappropriate conditions, does so with the knowledge that each person he regulates will have to confront and bear this financial burden as the necessary cost of a challenge to its actions.

WBA believes local units of government are emboldened by property owners repeatedly abandoning valid claims because the value of those claims may not

exceed the cost of justice. Repeated surrenders by property owners to the loss of their civil rights, acquiescing in improper exactions to obtain an already-deserved project approval, in our experience, encourages local officials to impose ever greater, more onerous demands.

Wisconsin, like many states, has a constitutional provision almost identical to the Fifth Amendment prohibition against uncompensated takings of private property.[3] Under *Williamson*, a Wisconsin claimant cannot bring a federal takings claim, in federal court, without first obtaining an adverse ruling by a state court on the factually identical, but legally separate, state constitutional claim. Only then can a claimant allege, under *Williamson*, that the state has "denied just compensation." If the claimant wins on his factually identical state constitutional claim, he may win compensation, but he has no pending federal claim on which to seek the remedies afforded under the Civil Rights Act.

WBA files this brief to urge this Court to grant certiorari review to the Petitioner, to revisit, and hopefully to change, its ruling in *Williamson*.

INTRODUCTION

WBA asks this Court to revise or overrule its prior ruling in *Williamson* because it effectively repeals the Civil Rights Act, 42 U.S.C. §1983, at least as it is applied to takings claims under the Fifth and Fourteenth Amendments to the United States Constitution.

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[3] WIS. CONST., art. 1, §13. The property of no person shall be taken for public use without just compensation therefor.

An important goal of 42 U.S.C. §1983, is the deterrence of individuals in positions of authority from using their powers to deprive those they regulate of their constitutional rights. *Williamson* releases land use regulators from these consequences.

A second goal of Congress under 42 U.S.C. §1983, is to open the federal courts to individuals claiming state or local officials have deprived them of rights guaranteed to them under the Constitution, so that they need not rely upon locally-elected judges to rule upon their claims. *Williamson* has closed the federal courts to constitutional takings litigants.

To assure the protections of the Civil Rights Act were available to all citizens, and not just to the wealthy, Congress enacted 42 U.S.C. §1988, The Civil Rights Attorney's Fees Awards Act of 1976. It enables a court to award reasonable attorney's fees and expert witness fees to a prevailing civil rights litigant. *Williamson* deprives property owners of this remedy.

I. THERE IS NO DETERRENCE IN THE COURT-ORDERED DISMISSAL OF FEDERAL TAKINGS CLAIMS.

The Bill of Rights, U.S. CONST., amends. I-X, was adopted to protect the civil rights of the people of the United States. The Fourteenth Amendment to the Constitution was adopted to prohibit the states from taking any action that would abridge the privileges or immunities of citizens of the United States. It expressly precludes the states from depriving any person of life, liberty or property without due process of law, and from denying any person the equal protection of the laws.

The mere existence of these constitutional limitations upon the powers of the state was deemed insufficient by

Congress to assure that states would respect these rights. Congress properly concluded the rights of the people are meaningless if public officials freely, or with impunity, choose to ignore them. Thus, Congress attached consequences to the violation or deprivation of these rights by those in positions of authority. It is an unfortunate reality that it is the penalty, and not the prohibition, that causes most people to obey speed limits.

Following adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, Congress observed that the rights assured by these amendments were being systematically disregarded in the former slave states. The Ku Klux Klan had been formed to terrorize and intimidate the freemen, as part of an effort to prevent them from exercising the rights recently granted to them. Local officials, it was believed, actively colluded with, or were intimidated by, the Klan to deprive recently freed slaves of the rights assured to them by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.[4] [5] [6] Congress

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[4] Excerpted from Debate before House of Representatives, on passage of Ku Klux Act of April 20, 1871, CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871). Representative William Stoughton, of Michigan, relates testimony before a House Committee of James E. Boyd:

> Question. What is your knowledge of the object and extent of this organization throughout the State?
>
> Answer. I can only state from hearsay-what I have heard from members of the organization. The number of the members of the organization is supposed to be forty thousand. Their object was the overthrow of the reconstruction policy of Congress and the disfranchisement of the negro.

[5] Excerpted from Debate before House of Representatives, on passage of Ku Klux Act of April 20, 1871, CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871). In this section, Representative William Stoughton, of Michigan, relates testimony before a House Committee of the Hon. Thomas Settle:

feared the state courts were in collusion with, sympathetic to or intimidated by the Klan. Fearing that filing a state court action failed to provide an adequate remedy for the protection of these rights, Congress enacted the Ku Klux Act of 1871 in response. The relevant parts of that Act survive today, in essentially the same form, as 42 U.S.C. §1983.

In so doing, Congress created a federal civil remedy to open the federal courts to civil rights claimants. Then, as

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> Question. What has been the effect on the public mind with reference to the security of person and property, of these outrages, and the difficulty in the way of punishment? Answer. Well, sir, I suppose any candid man in North Carolina would tell you it is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages. The defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury, or if you do, the petit jury acquits the parties. In my official capacity I sit with Judge Pearson and Judge Dick. Judge Pearson issued a bench warrant last summer for some parties, and had them brought before him at Raleigh. He requested Judge Dick and myself to meet him. We did so, and the trial extended over three weeks, and there it came to our knowledge that it was the duty and obligation of members of this secret organization to put themselves in the way to be summoned as jurors, to acquit the accused, or to have themselves summoned as witnesses to prove an *alibi*.

[6] Excerpted from Debate before House of Representatives, on passage of Ku Klux Act of April 20, 1871, CONG. GLOBE, 42nd Cong., 1st Sess. 321 (1871). In this section, Representative William Stoughton, of Michigan, argues in favor o. adoption of the Ku Klux Act of 1871:

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals.

now, federal judges were appointed for life, unlike state court judges, who customarily must stand for election periodically. It is commonly theorized that this distinction serves to make federal judges less susceptible to the political pressures affecting locally-elected judges. Thus, it is argued, the Civil Rights Act sought to allow civil rights claimants the opportunity, at their option, to have their claims heard before federal judges who were not subject to local political pressures.

Congress, in enacting the Ku Klux Act, made local and state officials violating the civil rights of those they regulate personally liable to their victims for damages. *Amicus* argues that Congress intended then, and today, that this personal liability provision would serve as a deterrent to those in a position to miss-use state power. When local officials recognize that a failure to respect the civil rights of those they govern can affect them personally, they will be less likely to disregard those rights as they govern. The converse is equally true.

Amicus contends that the goal of the deterrent implications of the Civil Rights Act is to discourage constitutional deprivations in the first place. It is not an inexpensive proposition to have to litigate to obtain approvals or compensation that should have been forthcoming in the first place.

In deciding *Williamson*, at p. 195, this Court concluded that a post-deprivation remedy, such as was found sufficient in *Parratt v. Taylor*, 451 U.S. 527 (1981), satisfied the Constitution. In so holding, however, no consideration was given to the deterrence objective of the Civil Rights Act.

Litigating a takings claim, at any level, is an expensive proposition for the property owner who must do so in order to obtain a permit that was wrongfully denied. The cost of the litigation must be added on to the cost of doing the

project, while contributing nothing to its value, unnecessarily delaying the commencement of the project for years. Ideally, local officials would exercise the powers conferred upon them with a recognition of the rights of those they regulate and the limitations placed upon them by the Constitution.

Amicus fears the absence of consequences for local officials encourages, rather than discourages, inappropriate regulatory behavior. Every cop on a beat is expected to be aware of and respect the constitutional rights of those she deals with. Every cop knows she has personal exposure when she crosses constitutional lines.

There are no such lines for local land use officials. Instead, they know, and quickly point out, as in the instant case, that a property owner cannot sue them for federal civil rights violations.

As things currently stand, post-*Williamson*, the state court litigation that is brought does not include a claim against those officials. State courts, certainly Wisconsin's, routinely dismiss federal takings claims, on ripeness grounds, citing *Williamson* as the justification for doing so. *Eberle v. Dane County Board of Adjustment*, 227 Wis. 2d 609, ¶¶46-48, 595 N.W. 2d 730, 745 (1999). Whatever deterrent affect Congress hoped to create is lost when state or local officials know that all federal claims brought against them will be dismissed under *Williamson*, that any litigation which does proceed will be based solely upon laws which do not hold them personally liable.

II. *WILLIAMSON* DEPRIVES TAKINGS LITIGANTS OF A CHOICE OF COURTS.

Williamson (473.U.S. at 196), holds that a takings claimant must first ask for available state relief, in state

court, before claiming that the state has taken his property without just compensation. It thus dismissed the federal action, compelling the claimant to proceed first to state court.

The decision did not provide, as perhaps it could, that the federal district court would first explore the availability of relief under state theories, as a court of concurrent jurisdiction, holding the federal claims in abeyance. Had it done this, the Court would have acted consistently with the goal of the Civil Rights Act to open the federal courts to civil rights claimants.

More importantly, the *Williamson* Court, having found that it first needed to know whether the state would provide just compensation, could, or should, have ruled that allowing the case to proceed in federal court was compelled by Fed. R. Civ. P. Rule 18(b), which expressly permits a party to join together in one lawsuit two claims, one of which is only cognizable after another claim has been prosecuted to a conclusion. It did not, however, sending the claimant instead to state court.

The Court should not lose sight of the facts which gave rise to the Ku Klux Act of 1871. The testimony presented to Congress called attention to the possibility that local politics might impact the impartiality of locally-elected judges. If a takings claimant believes local politics are such that a locally-elected judge would be under great political pressure when ruling upon the claimant's case, the Civil Rights Act suggests it is Congressional intent that the claimant have the choice of going to a federal court.

Unless the availability of this choice is now deemed inconsequential, or of no legal significance, the *Williamson* mandate would seem to deprive takings litigants of an important, Congressionally-bestowed, choice of forums.

A takings litigant asks a court to rule as to the propriety of a local governmental action. He may need to ask the

Court to allow him to move forward with a permitted, but sometimes politically unpopular, project. He may need to ask the Court to award him just compensation, or compensatory damages, which may ultimately prove to be substantial or politically unpopular.

It is not enough to say *Williamson* purports to allow a claimant denied compensation by a state court to subsequently seek relief in federal court, if the federal courts then must apply principles of issue and claim preclusion, adopting as their own, the rulings of the state courts the choice of forums was intended to allow a claimant to bypass. Such a course offers no choice of forum to this unique class of civil rights claimants.

The Bill of Rights was enacted to limit the power of government over the individual. The protections afforded by the Civil Rights Act are broader in that they are not limited to the protection of the rights set forth in the Bill of Rights. Rather, the Civil Rights Act prohibits the deprivation of the rights secured by the Constitution **and the laws.**

WBA would contend that the choice of forum afforded by Congress to civil rights claimants under the Civil Rights Act is one of the "rights, [or] privileges. . . secured by the Constitution and the laws." 42 U.S.C. §1983. As such, this Court cannot deprive citizens of that choice, unless this Court also finds that offering a takings claimant such a choice was not intended by Congress, or that Congress exceeded its authority in enacting that law, or that the law itself is unconstitutional.

III. AN UNCOMPENSATED TAKING OCCURS WHEN PROPERTY IS TAKEN AND COMPENSATION IS NEITHER PAID, NOR THE DUTY TO PAY IT ACKNOWLEDGED, AT THAT TIME.

Under *Williamson* (473 U.S. at 195), the City of Rochester's denial of all use of Mr. Kottschade's land represents only a taking. To be actionable in federal court, the state must also have denied just compensation to Mr. Kottschade. A federal court is not allowed to consider whether a taking prohibited under the federal constitution has occurred, for which compensation is due, until after a state court has ruled that compensation is not owed.

Taking *Williamson* on its face, if the Minnesota state courts would rule that the actions of the City of Rochester were improper, and amounted to a taking, but the same courts refused to grant just compensation, Mr. Kottschade would be entitled to pursue relief in federal court. Setting aside for the moment the questions raised by claim and issue preclusion, the logical first question that must be answered by Mr. Kottschade before filing his claim in federal court would be, "Who denied just compensation to me? Was it the City of Rochester, whose actions constituted a taking, or was it the state court that refused to award just compensation?"

Logically, only the City, or the individual city officials responsible for its actions, while acting under color of state law, could have denied compensation, since it is the City that the state court would have ordered to pay compensation if it had found compensation to be owed. Just as logically, the state court could not be liable for the payment of compensation, since it had done nothing constituting a taking, for which it could be found to owe compensation.

The problem with this conclusion lies in the fact that, if a state court found, instead, that the City of Rochester had taken Mr. Kottschade's property, and that it owed just compensation, all of the City's actions giving rise to both conclusions would have occurred prior to commencement of the state takings claim.

The flaw in the ruling in *Williamson* lies in the fact that, once the state takings claim is filed, all of the agency actions giving rise to the takings claim, as well as to the claim that just compensation has been denied, have already taken place. If all of the actions needed to give rise to a federal takings claim have already occurred, there is no logical basis to contend that the claim is not ripe for federal adjudication. The only way this could not be true is if the actions of the state court were deemed, for federal ripeness purposes, to be those of the City of Rochester.

Further demonstrating the flaw in *Williamson* would be a takings case brought in Wisconsin, which has a state constitution provision whose wording is essentially identical to the Fifth Amendment prohibition.[7] In Wisconsin, unlike Tennessee, and possibly Minnesota, inverse condemnation is not available as a remedy for a regulatory taking, compelling a takings claimant in Wisconsin to bring suit directly under the state constitution.[8] Given the strong similarity between the state and federal constitutional provisions, a Wisconsin plaintiff would need to make the same factual allegations as a

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[7] WIS. CONST., art. 1, §13, states: "The property of no person shall be taken for public use without just compensation therefore." By comparison, U.S. CONST., amend. V, states, in relevant part: "Nor shall private property be taken for public use, without just compensation."

[8] *Zinn v. State*, 112 Wis.2d 417, 428-429, 334 N.W.2d 67 (1983), citing therein to *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting J. Sackman, *Nichols' Law of Eminent Domain* Sec. 25.41 (3d ed. 1980).

federal takings claimant to establish first, that a taking had occurred, and second, that just compensation was due. The factual proof needed to show a state constitutional violation would be identical to that for a federal violation.

Applying *Williamson*'s logic,[9] the state constitutional claimant, faced with legally identical constitutional provisions, would not have a ripe state claim either, because no court would have previously ruled that he was not entitled to compensation. If this is not so, what, in the wording of the state constitution, compels a different outcome than that compelled by *Williamson*'s reading of the federal constitution?

Amicus contends the failure, or refusal, of a unit of government to pay just compensation at the time of a regulatory taking logically infers an intention, on the part of that unit of government, to take the regulated property, through regulation, without paying just compensation. The mere fact the unit of government has resisted such a determination, compelling resort to the courts, demonstrates both its intention to keep what it has taken, as well as its intention to retain that property without paying for it.

The states are well versed in providing just compensation for temporary takings of property when exercising their powers of eminent domain. It is common for them, in the course of constructing road improvements, to acquire a temporary easement, for example, in lands that are only needed as a staging area for a construction project, lands for which the state has no continuing need following completion of construction.

In such cases, the state or local unit of government typically acquires an easement to use the lands for a limited period of time. In Wisconsin, at least, the state declares its

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[9] "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson*, 473 U.S. at 194.

intention and identifies the parcel it intends to temporarily acquire, offers, and then pays, just compensation to the owner for the lands to be taken, at the time of taking. Compensation is typically set, by common practice, at ten percent of the estimated fair market value of the land taken, per annum, prorated over the length of the temporary taking. Typically, this compensation is paid to the owner, in advance, at the commencement of the taking.

The significant part of this process, *Amicus* would argue, is the acknowledgment by government, before litigation, of its liability for just compensation for the lands to be taken.

Disagreements may arise between an owner and the state as to the amount of compensation owed, but these disputes follow the acknowledgement by the state that compensation is due.

Mr. Kottschade, like most takings claimants, contends, and for purposes of a motion to dismiss, the Court must assume, that the City of Rochester's actions have already improperly taken his lands. He asks this Court to award him just compensation because, while the City has taken his lands, it refuses and has not yet compensated him for that taking. Rather than acknowledge its liability for just compensation, the City of Rochester apparently refuses to discontinue those of its actions which are alleged to constitute a taking, and further denies liability for, and has refused to pay, that compensation. Thus, *Amicus* would argue, both the taking and the denial of just compensation have already occurred. Under this analysis, the federal takings claim, like the parallel (and legally identical) state claim, is ripe for adjudication, because the City has failed, or refused, to acknowledge an obligation to pay just compensation, while it refuses to end its taking of Mr. Kottschade's land.

IV. THE RULING IN *WILLIAMSON* DEPRIVES SUCCESSFUL TAKINGS LITIGANTS OF THE BENEFITS OF §42 U.S.C. 1988.

Williamson, 473.U.S. at 200, directed federal courts to dismiss federal takings claims, on ripeness grounds, compelling claimants to first pursue available state remedies in state courts. Taking their lead from *Williamson*, state courts also dismiss federal takings claims on ripeness grounds, requiring claimants to first pursue available state takings claims.[10] Consequently, a successful state takings claimant has no pending federal claim when he asks the court for costs and witness fees.

While *Hensley v. Eckerhart* 461 U.S. 424, 434-35, (1983), enables a successful litigant on a parallel state claim to assume prevailing party status on a pending federal civil rights claim, a successful post-*Williamson* litigant on a parallel state takings claim, following dismissal of his federal claims, has no pending federal claim, and is denied the benefits of 42 U.S.C. §1988. [11] [12]

In Wisconsin, as in many states, principals of sovereign immunity prohibit the recovery of attorneys' fees from the state in the absence of a statute expressly authorizing such recovery. *Martineau v. State Conservation Comm.*, 54 Wis.2d 76, 79, 194 N.W.2d 664, 666 (1972). After finding a temporary regulatory taking under the state constitution, but finding no statute authorizing recovery of attorneys' fees in such a case, the Wisconsin Court of Appeals has concluded the successful litigant is not entitled to recover attorneys' fees.[13]

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[10] *Eberle*, 227 Wis. 2d at ¶48.
[11] *Eberle*, 227 Wis. 2d at ¶50.
[12] *Eberle*, 227 Wis. 2d at ¶55.
[13] *W.H. Pugh Coal Co. v. State*, 157 Wis.2d 620, 634-635, 460 N.W.2d 787, 792-793 (Ct.App. 1990).

The ruling in *Williamson* requires a claimant to establish the unavailability of a state remedy as a precondition to the existence of a federally-cognizable takings claim. Such a claimant, it holds, could not, following an unsuccessful trial, claim state deprivation of just compensation, because he could still not demonstrate, short of the exhaustion of all state court appeal rights, that state-awarded just compensation was not available. Thus, the claimant wishing to have a federal court consider his takings claim, faces many years before the trial court, intermediate and supreme courts of the state court system, along with the extraordinary legal costs such lengthy and prolonged litigation entails, all of which he must bear alone.

On first reading, the conditions imposed upon entry to the federal courts by a federal takings claimant seem less onerous than they have proven to be. One can speculate the Court did not contemplate it was requiring a federal takings claimant to bear alone the cost of first pursuing his claim all the way through the state court system just to ripen that claim sufficiently to have it heard in a federal district court.

In *Williamson*, at p. 196, this Court concluded the claimant should first pursue an available state inverse condemnation claim. The parties before the Court in that case did not need to raise the loss of eligibility for the benefits accorded to a successful litigant under 42 U.S.C. §1988, because, under Tennessee law, a successful inverse condemnation claimant, is also entitled to recover reasonable attorneys' fees.[14] The choice of remedy, in that

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[14] Tenn. Code Ann., §29-16-123(b), provides, in relevant part, as follows: Additionally, the court rendering a judgment for the plaintiff in a proceeding brought under subsection (a) . . . shall determine and award or allow to such plaintiff, as a part of such judgment or settlement such sum as will in the opinion of the court . . . reimburse such plaintiff for reasonable costs, disbursements and expenses,

case, did not serve to deprive the claimant of recovery of those fees. Thus, logically, this question was not presented to the Court for its consideration.

When, however, in states such as Wisconsin, where inverse condemnation is not an available remedy to a regulatory takings claimant,[15] and the only available state remedy consists of a claim directly under the parallel state constitution, with no state statute comparable to 42 U.S.C. §1988, allowing recovery of attorneys' fees, the unavailability of that remedy to a takings claimant presents a question not previously addressed by this Court.

In *Williamson*, at pp. 196-197, the Court concluded that: "Respondent **has not shown that the inverse condemnation procedure is unavailable or inadequate**, and until it has utilized that procedure, its taking claim is premature." (Emphasis supplied.) The Court's conclusions in *Williamson* are not universally true, but the ruling is being universally applied. Where inverse condemnation is not available to a regulatory takings claimant, such as in Wisconsin, and where a successful takings claimant has no state procedure providing for the recovery of attorneys' fees, application of *Williamson* deprives litigants of the benefits of 42 U.S.C. §1988.

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including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

[15] *Zinn*, 112 Wis.2d at 433.

V. FEDERAL RULE OF CIVIL PROCEDURE 18(B) SPECIFICALLY ALLOWS MR. KOTTSCHADE TO JOIN RIPE AND UNRIPE TAKINGS CLAIMS IN ONE FEDERAL COURT ACTION.

Fed. R. Civ. P. Rule 18(b) provides, in relevant part, as follows:

> Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action. . .

This Court has not previously addressed the applicability of this rule to a *Williamson* ripeness question, involving the impact upon a federal takings claim of the availability of a parallel state remedy. *Amicus* contends the preferable way for the federal courts to address this question would be to provide that the federal court first address the available state remedies, while holding in abeyance the pending federal claims. More importantly, *Amicus* contends, given the express right of a litigant to join a ripe state claim with an unripe federal claim in one proceeding, the dismissal of the federal claim is contrary to the procedural rules of this Court.

Allowing a claimant to proceed in accordance with this Rule would afford the choice of forum Congress intended to give to civil rights litigants. Holding open a 42 U.S.C. §1983 claim would also provide the deterrent to local officials Congress intended. It would also assure successful takings claimants, in states such as Wisconsin that do not provide for the recovery of litigation costs and attorneys' fees, that all citizens, in all states, will have equal access to justice in the courts.

CONCLUSION

Amicus Curiae, the Wisconsin Builders Association, respectfully asks this Court to grant the petition of Mr. Frank Kottschade for Certiorari Review of the ruling of the Court of Appeals for the Eighth Circuit, so that this Court can revisit, and hopefully change, its ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*.

Respectfully submitted,.

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